Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term 1998

EDWARD S. EMERY

Petitioner

v.

CITY OF TOLEDO, et al.

Respondents

Petition for Writ of Certiorari To the United States Court of Appeals for the Sixth Circuit

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APPENDIX

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6 pp

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

APPENDIX

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98-3304

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD SILVIO EMERY,	)	
Plaintiff-Appellant,	)	
v.	)	**ORDER**
CITY OF TOLEDO, ET AL.,	)	
Defendants-Appellees	)	

BEFORE: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

No. 98-3304

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD SILVIO EMERY,	)	
	)	
Plaintiff-Appellant,	)	ON APPEAL
	)	FROM THE
v.	)	UNITED
	)	STATES
CITY OF TOLEDO and	)	DISTRICT
CARLETON FINKBEINER,	)	COURT FOR
STEPHEN HERWAT, and	)	THE
ROBERT BURGER,	)	NORTHERN
INDIVIDUALLY and in their	)	DISTRICT OF
official capacities,	)	OHIO
	)	
Defendants-Appellees	)	

Before: SILER, DAUGHTREY, and GILMAN, Circuit Judges

SILER, Circuit Judge. Edward Silvio Emery appeals the magistrate judge's dismissal of his civil right action brought pursuant to 42 U.S. C. Section 1983 and the denial of his motion to amend his complaint. We affirm.

BACKGROUND

In 1981 Emery secured a building permit from the City of Toledo and began constructing an addition to his home using medieval techniques involving large stones and mortar. The construction remained ongoing at least through 1994.

Emery's premises were declared a nuisance on two occasions. On April 5, 1994, defendants issued a public nuisance citation to Emery. Pursuant to Section 1726.02(a) of the Toledo Municipal Code ("T.M.C."), he was ordered to:

> Cut all weeds, clean up all debris in driveway and rear yard. Stack wood 18" off ground an place neatly and cover with tarp. KEEP IN A NUISANCE FREE CONDITION AT ALL TIMES.

The notice warned that unless Emery complied with the directive within seventy-two hours, the City would abate the nuisance at his expense. Additionally, the notice stated that within three business days from the receipt of the notice, Emery could request a hearing on the

question of whether a pubic nuisance as defined in the T.M.C. exists if he posted a cash bond. The notice provided that an appeal would not stay the order to abate the nuisance. On April 21, 1994, Emery received a second nuisance citation. It directed Emery to:

> Remove concrete state, slabs, concrete blocks, all wood, windows (storm or otherwise), doors (storm or otherwise), construction equipment, construction tools, scaffolding, tires, and all other junk & debris. Maintain in a nuisance-free condition at all times.

This notice also advised Emery of the seventy-two-hour abatement deadline and his right to appeal the citation. Because Emery failed to challenge or comply with the directives of the nuisance notices, on May 2, 1994, the City filed a complaint in the Toledo Municipal Court.

In September 1994, Emery filed his first civil rights suit in the United States District Court against (1) the City, (2) John Meachum., individually and in his official capacity as Commissioner of Environment and Consumer Health and Environment, (3) Stephen

Herwat, individually and in his official capacity as Acting Commissioner of Building Inspection, and (4) Carleton Finkbeiner, individually and in his official capacity as Mayor of Toledo.

In April 1996, the court granted summary judgment to defendants. Specifically, it found that the City's procedure in dealing with the abatement of nuisances does not violate the Due Process requirements under either the United States Constitution or the Ohio Constitution. Moreover, the court found that the challenged sections of the T.M.C. are not vague or overbroad. In July 1997, this court affirmed the district court's decision.

In May 1997, the City issued a notice of condemnation and demolition. Accordingly, City emloyees executed the order of abatement and removed the nuisance. Emery claims that the City employees exceeded their authority to abate the nuisance by damaging his property and removing various building

stones, sculptures, and a flower bed which Emery submits were not a part of the abatement order.

In June 1997, Emery, *pro se*, filed his second civil rights complaint against the City, various Toledo officials, and one of his neighbors. Shortly thereafter, Emery obtained counsel and filed a first amended complaint against (1) the City, (2) Mayor Finkbeiner, (3) Commissioner Herwat, and (4) Robert Burger, the Demolition Manager of Toledo, alleging that "defendants have deprived him of personal rights, due process, and property right guaranteed under the United States Constitution and in doing so are liable under 42 U.S. C. Sections 1981 and 1983 and other federal and state laws." Specifically, Emery asserted that (1) the ordinance under which the demolition of the structure was authorized is unconstitutional on the grounds that it violates the Due Process clause of the United States Constitution; (2) the demolition of the addition and other structures on Emery's property exceeded the

scope of the order of nuisance abatement; (3) defendants exceed the scope of the abatement order in retaliation against the Emery for asserting his legal rights; (4) defendants intentionally or negligently caused damage to Emery's home and other structures on the property; and (5) defendants selectively enforced the T.M.C. nuisance abatement provisions against Emery.

In February, 1998, the magistrate judge1 denied Emery's motion to amend his complaint and granted defendants' motion to dismiss.

DISCUSSION

The court did not err by denying Emery leave to amend his complaint.

Rule 15(a) of the Federal Rules of Civil Procedure states that leave to amend "shall be freely given when justice so requires." However, a motion to amend should not be granted if it would be futile. *See Crawford v. Rome*, 52 F.3d 750, 753 (6th Cir. 1995).

1 The parties consented to have a magistrate judge conduct all proceedings and enter final judgment in this case.

We review the denial thereof for abuse of discretion. *See id.*

Emery moved the court to amend his complaint so that he could delete his Section 1981 claim and add a claim under the Visual Artists Rights Act, 17 U.S.C. Section 106, *et seq.* The fact that the court did not allow Emery to delete his Section 1981 claim is of no consequence. Additionally, it is clear that the added claim would have been futile. The Visual Artists Rights Act is part of the Copyright Title. *See* 17 U.S.C. Section 106, *et seq.* In order for Emery to enforce a claim under the Visual Artists Rights Act, he would have had to have registered his works under the copyright laws. *See id.* Emery does not allege that he possesses a registered copyright. Moreover, even if Emery had registered his copyright, res judicata would bar him from bringing this claim in a second suit of this nature. There is no abuse of discretion here.

The Court did not err by dismissing Emery's first amended complaint.

Whether a court correctly dismissed a suit pursuit to Fed. R. Civ. P. 12(b)(6) is a question of law subject to *de novo* review. *See Wright v. MetroHealth Med. Ctr.*, 38 D.3d 1130, 1138 (6th Cir. 1995). In deciding this case, the court relied upon the pleadings as well as (1) rulings from Emery's first case, (2) before-and-after demolition pictures of Emery's home and yard, (3) the nuisance citations issued to Emery and the notice of condemnation/demolition, (4) the complaint filed by defendants against Emery in the Toledo Municipal Corut, and (5) Emery's affidavit. Accordingly, this court must review this case *de novo* under the summary judgment standard of review. *See Harrow Prods., Inc. v. Liberty Mutual Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995).

First, the court correctly found that Emery's constitutional challenges to the face of the T.M.C. are barred by the doctrines of collateral estoppel and res

judicata. Second, the court correctly found that even if Emery's selective enforcement claim was not barred, Emery had not stated a claim because he has not asserted membership in a protected class. Third, the court found that Emery's claim that the City exceeded its rights under the T.M.C. when abating the nuisance and that the City employees' actions violated Emery's constitutional rights was also barred by the doctrine of res judicata as this claim "was related to the nuisance claims but not brought in the prior action." This finding is in error because Emery could not have raised this claim previously in that the events leading up to this particular claim had not transpired by the filing of the first suit. However, Emery's claims against individual defendants and the City must be dismissed for other reasons.

As to the liability of the individual defendants, Emery can prove that he has a clearly established right to be free from due process violations, to wit-

destroying his sculptures and garden and removing various stones without notice and without being heard, but he cannot show that the actions of the officials were objectively unreasonable in light of the clearly established right . *See, e.g., Megenity v. Stenger*, 27 F.3d 1120, 1124 (6th Cir. 1994). It was reasonable for the City employees to remove various stones, as the citations and the abatement notice called for the removal of concrete slate, slabs, as well as junk and debris. It was reasonable for City employees to remove various sculptures because, by Emery's admission, they were "were attached, associated with, or nearby the structures standing on the property." Finally, it was reasonable for the City employees to remove Emery's uncut garden of Cerastium which encompassed almost his entire front yard, based on one of the citations directing Emery to cut his weeds. Because Emery cannot establish a due process violation, the court was correct in dismissing his

Section 1983 claim against individual defendants based on their Eleventh Amendment immunity.

Eleventh Amendment immunity does not protect the City from liability under Section 1983 for the destruction of Emery's garden and sculptures. However, generally, a municipality cannot be held liable under Section 1983 under a theory of respondeat superior; rather, a plaintiff must plead and prove an injury caused by an action taken "pursuant to official municipal polity of some nature." *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978). Nowhere has Emery alleged such official policy that would support his claim against the City.

However, municipal liability may be imposed under Section 1983 for a single decision made by a municipal policymaker in certain circumstances. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477-484 (1986) (modifying *Monell*). Here, Emery has not alleged that an official policymaker made the decision to

"exceed" the bounds of the demolition order and thus cannot establish municipal liability.

Moreover, it has been established that "[a] citizen has no Section 1983 cause of action [for due process violation] . . .where state tort law furnishes all appropriate process, or where the deprivation cannot be predicted." *J.C. Flatford v. City of Monroe*, et al., 17 F.3d 162, 168 (6th Cir. 1994). Here, Emery concedes in his first amended complaint that state remedies are available to him. Accordingly, under the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part not relevant here by Daniels v. Williams*, 474 U.S. 327 (1986), Emery is also precluded from bringing a Section 1983 action against the City.

AFFIRMED.

2. OPINION AND ORDER, U.S. DISTRICT COURT (NORTHERN DISTRICT OF OHIO, WESTERN DIVISION), CASE NO. 3:97CV7452, DATED FEBRUARY 10, 1998

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Edward S. Emery

Plaintiff Case No. 3:97CB7452

vs.

City of Toledo, et al

Defendants **MEMORANDUM DECISION AND ORDER**

The parties have consented to have a United States Magistrate conduct all proceeding and enter final judgment in this civil rights case brought pursuant to 42 U.S. C. Section 1983. The Court has jurisdiction under 28 U.S.C. Section 1331. Pending are the Plaintiff's motion to Amend Complaint (Docket No. 36) and the Motion to Dismiss (Docket No. 27-1) or for Summary Judgment (Docket No 27-2) filed by Defendants City of Toledo, Carleton Finkbeiner, Stephen Herwat and Robert Burger (Docket No. 27). For the reasons that follow, Plaintiff's Motion to Amend is Denied and Defendant's Motion to Dismiss is Granted and the Motion for Summary Judgment is Denied as Moot.

FACTUAL BACKGROUND

In 1981, Plaintiff secured a valid building permit from the City of Toledo to begin construction of a home at 2448 Portsmouth Avenue, Toledo, Ohio. Construction on the house was still ongoing on April 21, 1994, when the City of Toledo, Ohio, (City) through the Department of Health and Environment issued a citation to Plaintiff to remove from the Portsmouth Avenue premises specific "junk and debris." Such premises were declared a nuisance pursuant to Chapter 1726(a) of the Toledo Municipal Code (TMC). Plaintiff was ordered to abate the nuisance within 72 hours from the date of the notice or the nuisance would be abated by the City at his expense. The notice also advised Plaintiff of his right to have a hearing on whether a nuisance existed and required abatement provided he request such hearing with 3 business days.

The City notified Plaintiff on May 29, 1997 that it would abate the nuisance on his property pursuant to the TMC. Such order of abatement was executed on May 27, 1997 by City employees. Plaintiff claims the City employees exceeded their authority to abate the nuisance by damaging his property, and removing his sculptures and a flower bed. The sculptures and flower bed, according to Plaintiff, were not a part of the nuisance order.

Plaintiff filed this cause of action against the City of Toledo, Mayor Carleton Finkbeiner, Stephen Herwat, Acting Commissioner of Building Inspection, and John Meacham, Commissioner of Environment and Consumer Health and Environment, claiming violations of his First, fifth, and Fourteenth Amendment rights on September 29, 1994. He also sought to have portions of the TMC declared unconstitutional. In addition, Plaintiff requested injunctive relief regarding the pending criminal proceedings for his failure to comply with the

abatement order. This court, in an order by United States District Court Judge David A. Katz, declared the TMC constitutional, and Plaintiff's claim that the TMC was overbroad was dismissed on summary judgment for the Defendants. (*See* Order of April 15, 1996 in Case No. 3:94CV750). Judge Katz also held that since an appeals process to the Nuisance Abatement Housing Appeal Board was provided, Plaintiff's failure to avail himself of his rights to a hearing as provided under TMC Section 1726.04(a), does not rise to the level of a constitutional violation. The Sixth Circuit Court of Appeals found Plaintiff's appeal without support in law or fact and affirmed Judge Katz' decision. (*See* Order Dated July 31, 1997 in Case No. 96-3510).

MOTION TO DISMISS AND SUMMARY JUDGMENT STANDARDS

Defendants seek dismissal of Plaintiff's claims on the basis that they are barred under doctrines of collateral estoppel and res judicata. A motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b) tests whether the

complaint adequately states a claim and whether the notice requirements of Rule 8(a) calling for a "short and plain statement of the claim" have been satisfied. Broyde v. Gotham Tower, Inc., 13 F.3d 994, 996 (6th Cir. 1994 *cert. denied* 114 S.,Ct. 2137 (1994). A motion to dismiss under FED R. CIV. P. 12(b)(6) requires the Court to construe the complaint in the light most favorable to the Plaintiff, accept all of the complaint's factual allegations as true, and determine whether the Plaintiff can prove no set of facts that would entitle him or her to relief. Meador v. Cabinet for Human Resources, 902 F.2d 474, 475 (6th Cir. 1990) *cert. denied* 115 S. Ct. 182 (1990). The court's inquiry is limited one and even though it appears on the face of the pleading that a recovery is very remote and unlikely "the issue is not whether a Plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." Scheuer v. Rhodes, 94

S. Ct. 1683, 1686 (1974); Conley v. Gibson, 78 S. Ct. 99, 101-102 (1957).

In the alternative, Defendants seek summary judgment. The procedure for initiating a motion for summary judgment is designed to dispose of cases in which there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. See FED. R. CIV. P. 56. Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, with the affidavits if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED R. CIV. P. 56(c); Copeland v. Machulis, 57 F.3d 476, 478 (6th Cir. 1995) (*citing* LaPointe v. UAW Local 600, 8 F.3d 376, 378 (6th Cir. 1993).

The moving party bears the initial burden of establishing an absence of evidence to support the nonmoving party's case. Celotex Corporation v. Catrett, 106 S. Ct. 2548, 2552-53 (1986). In the face of

a Defendant's properly supported Motion for Summary Judgment, a Plaintiff cannot rest on his or her allegations to get to the jury without significant probative evidence tending to support the complaint. Anderson v. Liberty Lobby, Incorporated, 106 S. Ct. 2505, 2510 (1986) (*citing* First National Bank of Arizona v. Cities Services Co, 88 S. Ct. 1575, 1593 (1968). The mere existence of a scintilla of evidence to support a Plaintiff's proposition will be insufficient, there must be evidence on which a jury could reasonable find for the Plaintiff. Anderson, 106 S. Ct. at 2512.

To oppose a motion for summary judgment successfully, the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1355 (1986). In determining if the facts are material, the court must look to the substantive law. The evidence of the non-movant is then taken as true and all justifiable inferences are

drawn in his or her favor. Id. at 2510 (*citing* Addickes v. S. H. Kress & Co., 90 S. Ct. 1598, 1609-10 (1970). The Court must refrain from resolving conflicts in the evidence or making credibility determinations. Id. If, after deciding, the dispute about a material fact is genuine, summery judgment should be denied.

DISCUSSION

Plaintiff brings the present action under 42 U.S.C. Section 1983, claiming the TMC Section 1706 *et. seq.* is unconstitutional because while it does provide a party with the right to an administrative hearing, it is not a meaningful right to a hearing because the appeal of the nuisance determination requires a cash bond and must be made within three days after receiving notice. Plaintiff further claims the City selectively enforces TMC Section 1726.02(a), the nuisance abatement provisions, and that when the City abated the nuisance on his property they exceeded the scope of the citation by removing building stones, other valuable stones,

sculptures and a valuable flower garden. Such allegations are lodged against the City and Defendants Finkbeiner, Herwat, and Burger in their individual and official capacities. The Defendants claim Plaintiff has not shown that his constitutional rights have been violated, and raise the defenses of collateral estoppel, res judicata, and qualified immunity.

1. Collateral Estoppel

Collateral estoppel, or issue preclusion, precludes the relitigation of issue of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment. Gargallo v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 918 F2d 658, 661 (6th Cir. 1990) *cert. denied* 113 S. Ct. 623 (1992) (*citing*, J. Friedenthal, M. Kane, & Miller, CIVIL PROCEDURE at 607-09 (1985). Collateral estoppel applies to those parties in privity with a named party. Central Transport, Inc. v. Four Phase Systems, Inc. 936

F.2d 256, 260 (6th Cir. 1991) (*citing* Montana v. United States, 99 S. Ct. 970,153 (1979).

The previous action addressed the issues of the constitutionality of the language of the TMC Sections 1369.01 and 1726.01, and an alleged procedural due process violation from enforcement of such sections. Judge David A. Katz's order specifically found that the TMC Section 1726.01 gave an extensive definition of nuisance; however, Plaintiff's challenge to the ordinance as vague and overbroad was without merit. (Katz Order at 7). Plaintiff, the City, Defendants Finkbeiner, and Herwat were all parties in the earlier action. Burger, as an officer of the same government, in privity with those Defendants. Therefore, collateral estoppel bars Plaintiff from relitigating those issues related to the constitutionality of TMC or rights of due process.

II. Res Judicata

Once there is a final judgment on the merits, the doctrine of res judicata, or claim preclusion, bars a party

from bringing a subsequent lawsuit on the same claim or cause of action or raising a new defense to defeat a prior judgment. Id. at 660. Res judicata precludes relitigating claim or causes of action previously adjudicated and those claims or defenses that should have been raised, but were not in the claim or cause of action previously adjudicated. Id. For a claim to be precluded by res judicata, four requirements must be met: 1) a final decision on the merits in the first action by a court of competent jurisdiction; 2) the second action involves the same parties, or their privies, as the first; 3) the second action raises an issue actually litigated or which should have been litigated in the first action; and 4) an identify of causes of action. Sanders Confectionery Products v. Heller Financial 973 F.2d 474, 480 (6th Cir. 1992) *cert. denied* 113 S. Ct. 1046 (1993) (citing King v. South Cent Bell Tel. & Tel Co., 790 F2d 524 (6th Cir. 1986); Grover v. Eli Lilly & Co., 896 F. Supp. 725, 727 (N.D. Oh. 1995).

Here, there is no dispute that the earlier decision of the District Court and the Sixth Circuit are final decisions on the merits by Courts of competent jurisdiction. Further, the only party to this action that was not in the prior action is Burger. All other parties were involved in the previous action. The Supreme Court stated in Sunshine Anthracite Coal Co. v. Adkins, 60 S. Ct. 907, 917 (1940), "[w]here the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal." The Court also stated that privity exists between officers of the same governments, so that a judgment in a suit between a party and another officer of the government precludes the party from relitigating the same issue against another officer of the same government. Id. Therefore, because all Defendants are officers of the same government, the prior judgment bars relitigation against them.

As to the third requirement, the first action decided the question of the constitutionality of the language of the TMC, and the sufficiency of its appellate procedure. Any claims as to the constitutionality of the TMC's language, alleged procedural due process violations, or arising out of the events leading up to the enforcement of the TMC not raised in the previous action should have been brought in the earlier action and are barred under principles of res judicata.

Plaintiff's claim under the Visual Artist's Right Act, 17 U.S.C. Section 106A is also barred under principles of res judicata. Section 106A states that a visual artist:

(3) subject to the limitations set forth in section 113 (d), shall have the right - -

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right

This statute creates a right to prevent the distortion, mutilation, or modification of a visual artist's work. Plaintiff is foreclosed from exercising this right since he failed to assert such rights in the earlier action because the structure that had been declared a nuisance included Plaintiff's sculptures. Res judicata requires an identity of claims. This means that the claims rely on the same set of operative facts. Plaintiff's claims regarding the removal of his statutes arise out of the City's issuance of a nuisance citation, which includes the proposed enforcement of the TMC. These facts are identical to those of the earlier action. The abatement orders specifically stated that if Plaintiff did not abate the nuisance, the City would abate it. By his own admission, the sculptures were "attached, associated with, or nearby the structure standing on the property." (Doc. 37). Plaintiff is foreclosed from relitigating the removal of such statutes as their removal arises out of events leading up to the enforcement of the TMC.

Plaintiff claims only those issues that were resolved in the prior action are precludes, *citing* Hicks v. De La Cruz, 52 Ohio St. 2d 71, 73, 369 N.E. 2d 776, 777 (1977). In Hicks, the Supreme Court of Ohio explained that the modern view of res judicata embraces the doctrine of collateral estoppel, which basically states that if an issue of fact or law actually is litigated and determined by a valid and final judgment, such determination being essential to that judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. Id. 52 Ohio St. 2d at 74, 369 N.E. 2d at 777. A party precluded under this principle from relitigating an issue with an opposing party likewise is precluded from doing so with another person unless s/he lacked full and fair opportunity to litigate that issue in the first action, or unless other circumstances justify according him an opportunity to relitigate that issue. Id. The Hicks decision does not allow for the abandonment of claim

preclusion. Since Plaintiff failed to avail himself of the opportunity to litigate, res judicata bars Plaintiff's claims that were related to the nuisance claims but not brought in the prior action.

III. Selective Enforcement Claim

Plaintiff claims that Defendants singled him out for prosecution. The Magistrate construes such claim as an equal protection arising form the enforcement of the TMC. Such claim also arises out of the underlying action and is barred under principles of res judicata. Even if the selective enforcement claims were not barred, Plaintiff has failed to state a claim under the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment provided that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amendment XIV, S 1. It is 'essentially a direction that all persons similarly situated should be treated alike." City of Cleburne. v. Cleburne

Living Ctr., 105 S. Ct. 3249, 3254 (1985). "To state a claim under the Equal Protection Clause, a Section 1983 Plaintiff must allege that a state actor intentionally discriminated against the Plaintiff because of membership in a protected class." LRI Properties v. Portage Metropolitan Authority, 55 F. 3d 1097, 1111 (6th Cir. 1995) (*citing* Henry v. Metropolitan Sewer Dist., 922 F. 2d 332, 341 (6th Cir. 1990).

Plaintiff has not asserted membership in a protected class. Consequently, his equal protection claim must fail.

IV. Qualified Immunity

The remaining claim is that City employees exceeded the scope of their authority when they abated the nuisance on Plaintiff's property on May 27, 1997. Specifically, Plaintiff claims that when City employees were removing debris, stones, and junk, they allegedly damages his sculptures and removed his flower garden, both of which, Plaintiff claims, were not related to the

nuisance to be abated. Because the decision from the earlier action had been rendered before May 27, 1997, any claims arising on or after May 27, 1997, could not have been brought in the earlier action, and are therefore not barred by collateral estoppel or res judicata.

However, Defendants claim they are immune to suit for damages for actions taken during the course of their employment. In Harlow v. Fitzgerald, 102 S. Ct. 2727, 2738 (1982), the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional right of which a reasonable person would have known." Thus, to prevail in the face of a qualified immunity defense, Plaintiff must show that: 1) he "has a clearly established statutory or constitutional right," Megenity v. Stenger, 27, F 3d 1120, 1124 (6th Cir. 1994); and 2) the actions of the officials were objectively unreasonable in light of

the clearly established right. Adams v. Metiva, 31 F. 3d 375, 387 (6th Cir. 1992).

To satisfy the first requirement, violation of a clearly established constitutional or statutory right, Plaintiff must show that the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right, and the unlawfulness is apparent. Anderson v. Creighton, 107 S. Ct. 3034, 3040 (1987). Here, Plaintiff claims he was deprived of his property without doe process when the City employees allegedly exceeded the scope of their authority when abating the nuisance by damaging his sculptures and his flower garden. Clearly, the City had the right to enter Plaintiff's property and abate the nuisance. Solly v. City of Toledo, 7 Ohio St. 2d 16, 18, 48 N. E. 2d 463, 465 (1966). The earlier decision of this Court upheld the TMC and the City's proposed enforcement of it. Therefore, Plaintiff must show that the sculptures and flower garden were not part of the

nuisance to be abated, and so clearly separated from the nuisance that any City employee removing them would know that they were outside of his authority.

Plaintiff submits copies of the nuisance notices he received on April 5, 1994 and April 21, 1994, which describe the items to be cleaned or removed. (Doc. 37) These items include: concrete slate, slabs, blocks, wood, windows (storm or otherwise), doors (storm or otherwise), construction equipment, construction tools, scaffolding, tires and all other junk and debris. The notices also order Plaintiff to cut all weeds, stack and cover all wood, and keep his property nuisance free at all times. Plaintiff also submits an affidavit, which states that the City workers, "removed or destroyed sculptures that I had painstakingly created, and which were attached, associated with, or nearby the structure standing on the property." By Plaintiff's own admission the sculptures were attached, associated, or near the structure that had been found to be a nuisance.

Therefore, the sculptures were a part of the nuisance to be abated, and the City employees were authorized to remove them. Plaintiff was not denied his property without due process, and no constitutional violation resulted from the removal of the sculptures. Therefore, the individual Defendants are entitled to qualified immunity as to any Section 1983 claim arising form the removal of the sculptures.

The Plaintiff also claims he was deprived of his flower garden without due process. The nuisance abatement orders do not specifically list the flower garden. Then only part of the notice that may have applied to the flower garden is the order to cut all weeds and maintain the property in a nuisance free manner at all times. Plaintiff states in his affidavit that the City employees "destroyed or removed a flower garden in the front yard of the property, in which I was cultivating certain decorative and valuable plants which had taken years to grow. This garden was not associated with any

of the structures or items mentioned in the nuisance determinations or orders." (Doc. 37) This self-serving statement is not enough to show a distinction between the nuisance to be abated and the flower garden great enough to make its removal clearly outside the scope of the nuisance abatement order. If a City employee could have reasonable believe the "flower garden" constituted the weeds referred to in the order, or that it was part of the nuisance, its removal is protected by qualified immunity. Plaintiff also submitted pictures of his property before and after May 27, 1997. (Doc. 1, Ex. A & B). Exhibit A shows Plaintiff's front yard including the flower garden. It stretches the length of the yard, and contains thick green foliage. The pictures do not resolve the question of whether it is a painstakingly created flower garden, or an area of overgrown weeds. Because a reasonable City employee could believe that the foliage constitutes the weeds referred to in the nuisance order, or was part of the overall nuisance to be

abated, the City employee could have reasonable believed the removal of the flower garden was within the scope of his or her authority under the abatement order. Therefore, because Plaintiff has not met his burden of showing the violation of a clearly established right, and that a reasonable official would understand that his or her actions violated that right, Defendants are entitled to qualified immunity as to the Section 1983 action for removal of the flower bed.

V. Motion to Amend Complaint

Plaintiff seeks leave to amend the Complaint to delete his earlier claim of a violation of 42 U.S.C. Section 1981, to alter his Section 1983 claim to include allegations of selective enforcement of the nuisance abatement ordinance, and to add a claim under the Visual Artist's Right Act, 17 U.S.C. Section 106A.

Defendants argue that the Motion to Amend the Complaint should be denied because the amendment would be futile. Defendants claim that the Amended

Complaint could not withstand a motion to dismiss because the claims are barred by the defenses of collateral estoppel, res judicata, and qualified immunity. If the merits of the second amended complaint can withstand a motion to dismiss, Plaintiff's motion for leave to amend the complaint should be granted.

Rule 15 (a) of the /Federal Rules of Civil Procedure declares that leave to amend "shall be freely given when justice so requires." In Foman v. Davis, 82 S. Ct. 227, 230 (1962), the Supreme Court stated that court should grant leave to amend under Rule 15(a) liberally. However, a motion to amend a complaint should be denied it would result in undue delay or prejudice to the opposing party, or it would be futile. Crawford v. Roane, 53 F.3d 750, 753 (6th Cir. 1995) *cert. denied* 116 St. Ct. 1354 (1996). A court's denial of a motion for leave to amend a complaint is reviewed for abuse of discretion. Id.

since Plaintiff's proposed claim under 17 U.S.C. Section 106A is barred by res judicata, and his claims under 42 U.S. C. Section 1983 are barred by collateral estoppel, res judicata, or qualified immunity, a second amended complaint arising out of the abatement could not withstand a motion to dismiss or for summary judgment. Such amendment is therefore futile and must be denied as moot.

For the reasons that Plaintiff has failed to state a claim under the Equal Protection Clause and his remaining claims are barred under principles of res judicata and collateral estoppel. Plaintiff's Motion to Amend Complaint (Docket No. 36) is Denied; Defendant's Motion to Dismiss (Docket No. 27-1) is Granted and the Motion for Summary Judgment (Docket No. 27-2 is Denied as Moot.

IT IS SO ORDERED.

Vernelis K. Armstrong

NOTICE OF APPEAL FILED WITH U.S. COURT OF APPEALS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Edward Emery	Case No. 3:97CV7452
Plaintiff	Judge Carr
v.	Magistrate Armstrong
City of Toledo, et al.,	**NOTICE OF APPEAL**
Defendants	Kollin Rice (0066513) 5800 Monroe St. Bldg. E Sylvania, Ohio 43560 (419) 882-0241 Attorney for Plaintiff

Notice is hereby given that Edward S. Emery, Plaintiff in the above-captioned case, hereby appeals to the United States District Court for the Northern District of Ohio, Western Division from the final judgment of the Magistrate entered is Court entered February 13, 1998.

The parties to the judgment and the names and addresses are as follows:

Edward S. Emery Attorney Kollin L. Rice
5800 Monroe St., Bldg. E
Sylvania, Ohio 43560

The City of Toledo
One Government Center
Toledo, Ohio 43604

Carlton S. Finkbeiner, individually and in his Official capacity as mayor of The City of Toledo including his agents and assigns.
2260 Townley Rd.
Toledo, Ohio 43614

Stephan Herwat, individually and in his official capacity as Commissioner of the City of Toledo Div. Of Inspections and Building Permits
3807 Green Meadow Ct.
Toledo, Ohio 43614

Robert Burger, individually and in his official capacity as Demolition Manager for The City of Toledo
320 Parker Ave.
Toledo, Ohio 43613

All parties but Mr. Emery are represented by:
Lourdes Santiago, Esq.
City of Toledo Law Department
One Government Center, Suite 2250
Toledo, Ohio 43604

_____
Kollin L. Rice

FEDERAL CIVIL RULE 12C

(c) **Motion for Judgment on the Pleadings**. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. 1983

Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

7. CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoig Appendix was mailed to Barbara Herring Attorney ofr Respondent City of Toledo, and Lourdes Santiago, Attorney for Respondents at City of Toledo Law Department, One Government Center 22nd Floor, Toledo, Ohio 40604 this 16 day of July, 1999.

Edward S. Emery
Pro Se